Supreme Court, U.S.
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No. 06-130

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN A. PALAKOVICH, SUPERINTENDENT OF SCI SMITHFIELD; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Petitioners,

v.

CLAYTON THOMAS ,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where counsel's action at trial is objectively reasonable, may the conviction nonetheless be reversed on the ground that counsel's subjective thought process is found deficient?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit, in conflict with other circuits.)

2. Where a state court has clearly adjudicated the merits of an ineffective assistance of counsel claim, may a federal court avoid AEDPA deference and invoke de novo review as to any aspect of the claim that, in the federal court's view, has not adequately been addressed in the state court's legal analysis?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

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REASONS FOR GRANTING THE WRIT

I. *Strickland* requires objective review of ineffective assistance claims, external to counsel's actual thoughts; the circuits conflict.

In the petition for certiorari, petitioner observed that *Strickland v. Washington*, 466 U.S. 668 (1984), established an objective standard for evaluating claims of ineffective assistance of counsel. Petitioner argued that such a standard, by definition, requires the court to go beyond counsel's own, subjective account of his conduct where that account does not provide a reasonable basis for his action. In such situations the court must determine if a reasonable attorney could have had a sound basis for the conduct, regardless of whether the lawyer under attack has himself articulated that basis. Petitioner argued that the circuits have split on their willingness to engage in such an external inquiry into reasonable basis.

Respondent does not exactly address the question presented. Instead, he recasts the question as whether an attorney's testimony about his conduct is *relevant* to the ineffectiveness analysis. He then presents a tangle of detail about the cases cited by petitioner, portrays all of them as relying on the challenged attorney's own reflections, perceptions or intentions, and thereby "proves" that no circuit conflict exists.

But petitioner has never argued that trial counsel's testimony is irrelevant to a claim that the attorney acted ineffectively. Pet. at 19. The question here is whether such testimony is a *starting* point, or an *ending* point. Several circuits are prepared to go *past* counsel's personal reflections, to explore reasonable bases for the conduct in question even if counsel did not actually have those rationales in mind. Other

courts hold, like the Third Circuit in this case, that a strategy, even if sound, must "in fact" have motivated trial counsel, and that "hypothetical strategies" will not be considered. Pet. App. 17-18. Despite respondent's attempts to smudge these lines, the positions are distinct, and they are in conflict.

Respondent first attempts to explain away *Cofske v. United States*, 290 F.3d 437, 444 (1st Cir. 2002). Respondent declares that, while the court of appeals there did not need "precise" or "detailed" testimony from counsel, it still "delved deeply" into counsel's thought processes. Therefore, respondent concludes, the First Circuit is really a subjective court on ineffective assistance claims.

The problem with this argument is that counsel in *Cofske* never testified about their thought processes. Thus the court of appeals did not delve at all, much less delve deeply, into counsel's *actual* thought processes, because it had no evidence of them.

That is why the court's opinion is sprinkled throughout with conjectural phrasing. "[C]ounsel *must have thought* it in Cofske's interest"; "[i]t is *virtually certain* that ... defense counsel noticed"; "the decision ... was *almost certainly* a judgme call"; "any competent appellate counsel *would have had* to consider"; "appellate counsel ... *might reasonably have* hesitated." These were not counsel's explanations. Rather these phrases, used interchangeably by the court, all indicate *inference*. The *court provided its own reasons* to illustrate that a competent attorney would have acted as Cofske's lawyers did.

That is the key. The court applying an objective ineffectiveness test may not know and does not confine itself to counsel's actual thoughts. Instead it makes inferences about what the hypothetical reasonable attorney would do.

The remainder of respondent's discussion of the circuit conflict is of a similar piece: he seizes on any reference to the actual thought processes of assigned counsel, and then characterizes such reference as *circumscribing* the standard of review. Thus he contends, for example, that a case like *Bullock v. Carver*, 297 F.3d 1036 (10th Cir. 2002), is really an example of the subjective approach, because the opinion includes discussion of trial counsel's actual level of knowledge about the law. But *Bullock*, like the other cases respondent looks to, did not stop there. In the end, the court upheld the conduct on a rationale that neither of Bullock's lawyers had actually thought of at the time of trial. *Id.* at 1051-54.

What matters, of course, is not whether the court assesses counsel's testimony along the way, but whether it is willing to look beyond the individual attorney to judge the conduct against an independent standard of competence. Under an objective approach, it may be perfectly appropriate to begin with consideration of counsel's actual thought process, if that is sufficient to establish a reasonable basis. If not, however, then it *no longer matters* whether the attorney's alleged defect is ignorance of law, drug use, or any other idiosyncrasy. At that point, the inquiry is what a reasonable lawyer could have, would have, might have, may have done under the circumstances.

And that is exactly the approach that the "objective" circuits – the 1st, 9th, 10th, and 11th – have taken in case after case (emphasis added):

1st Circuit *See, e.g., United States v. Walters*, 904 F.2d 765, 772 (1st Cir. 1990) ("attorney's failure to cross-examine ... ***could*** ... ***have been*** the result of a decision ..."); *United States v. Oliveras*, 717 F.2d 1, 4 (1st Cir. 1983) ("Counsel ***could well have reasoned*** ..."); *Isabel v. United States*, 980

F.2d 60, 65 (1st Cir. 1992) ("counsel ***could reasonably have*** concluded ...").

9th Circuit *See, e.g., United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991) ("***it may be*** that Molina's attorney thought .... ***Whatever the actual explanation***, *Strickland* requires" affirmance); *Dubria v. Smith*, 224 F.3d 995 (9th Cir. 2000) ("a reasonably competent attorney ***could have*** refrained from objecting"); *Morris v. California*, 966 F.2d 488, 456 (9th Cir. 1992) ("***We need not determine the actual explanation for trial counsel's failure to object***, so long as his failure to do so falls within the range of reasonableness representation"); *Denham v. Deeds*, 954 F.2d 1501, 1505 (9th Cir. 1992) (counsel's omission "***may have in some way been*** a tactical decision"); *United States v. Bosch*, 914 F.2d 1239, 1246 (9th Cir. 1990) (trial counsel "***could reasonably have***" decided to allow leading questions to avoid damaging testimony); *United States v. Medina-Alvaro*, 637 F.2d 649, 653 (9th Cir. 1980) ("counsel reasonably ***could have decided*** that the best tactic was for appellant to take the stand....").

10th Circuit *See, e.g., Thornburg v. Mullin*, 422 F.3d 1113, 1140 (10th Cir. 2005) (counsel "***could have viewed***" defense he did not present as weaker than the one actually presented); *Minner v. Kerby*, 30 F.3d 1311, 1317 (10th Cir. 1994) ("***counsel reasonably could have concluded***" that witness he did not call had credibility problems).

11th Circuit *See, e.g., Harich v. Dugger*, 844 F.2d 1464, 1470-71 (11th Cir. 1988) (*en banc*) ("It is not enough for petitioner to claim that his lawyer was ignorant of the Florida law. Petitioner must prove that the approach taken by defense counsel would not have been used by professionally competent counsel. ... A competent attorney completely informed on the [law] ... could well have taken action identical to counsel in this case"); *Crawford v. Heade*, 311 F.3d 1288,

1318 (11th Cir. 2002) (court must determine "whether any other objectively reasonable lawyer might have taken the approach [counsel] actually took"); *Williamson v. Moore*, 221 F.3d 1177, 1180 (11th Cir. 2000) ("inquiry focuses on whether a reasonable attorney could have acted in the same manner as trial counsel did").

Meanwhile the circuits on the other side of the divide, those employing a subjective approach, have had no trouble making clear their contrary conception: these courts will find ineffectiveness, *even if* some competent attorney would have taken the same action, as long as the actual attorney did not *in fact* have a good reason for his conduct. *See, e.g., Greiner v. Wells*, 417 F.3d 305, 320 (2nd Cir. 2005) ("we conclude that [counsel] pursued an objectively reasonable course of action.... But that does not end the matter'); Pet. at 12-14. Respondent acknowledges the position of these circuits, accepts the Third Circuit as among them, and even adds two more circuits to the list. Brief in Opp. at 16. He denies only that any other view exists.

Curiously, though, after all his effort to portray ineffectiveness review as exclusively subjective, Respondent takes an odd tack. He makes the surprising assertion that the Third Circuit actually employed an *objective* standard of review. Brief in Opp. at 18-19. He cites to a two-sentence passage in the opinion below, in which the court refers to counsel's "purported" strategy of allowing the identification in order to cross-examine the witness about "police tactics" in securing the evidence. Pet. App. 19.

These two sentences, however, are tucked in the middle of a paragraph that begins and ends in explicit reliance on trial counsel's subjective testimony: that he didn't *have* a strategy, because he (mistakenly) believed that he was time-barred from filing a suppression motion. Together with the

court's use of the word "purported," this context belies the notion that the Third Circuit believed it was free, let alone obliged, to rely on any rationale outside counsel's own account of his thought processes. Indeed, the court had just stated, on the preceding page, that it would not "reward" allegedly incompetent counsel by considering "hypothetical strategies." Pet. App. 18.

Alternatively, respondent appears to be suggesting that, if and when an objective standard ever were applied to his ineffectiveness claim, he would win anyway, and therefore the case is not worth the grant of review. This is so, he says, because trial counsel could have secured suppression of the witness Fuller's identification, while still using Fuller to establish that police were knowingly framing respondent for murder. Accordingly, a strategic decision to forgo suppression could never have been deemed reasonable.

But the argument is not thought through thoroughly. As the state courts recognized, there was no sure way to advance the frame-up defense through witness Fuller had his testimony been suppressed. If the identification evidence were ruled inadmissible, how would the prosecution put the witness on the stand? If the witness never testified, how would the defense cross-examine him to bring out the alleged frame-up? And if the defense called the witness on its own, how could it question him about the identification process without revealing, or allowing the prosecution to reveal on cross, the fact of the identification? Respondent does not address any of these questions.

Nor does respondent have much to say about the policy implications of the subjective approach he champions. His argument comes down to a complaint that a truly objective standard of review will "excuse" bad lawyers who deserve to be punished. Brief in Opp. at 18. But that begs the

question at the heart of the issue before the Court: is the Sixth Amendment about the competence of the defendant's attorney, or is it about the fairness of the defendant's trial? *See, e.g., Mickens v. Taylor*, 535 U.S. 162, 166 (2002) ("This right has been accorded, we have said, 'not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial'") (citation omitted); *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2566 (2006) (Alito, J., dissenting) ("The Assistance of Counsel Clause focuses on what a defendant is entitled to receive ('Assistance'), rather than on the identity of the provider").

The dilemma is perhaps most pointed in those cases where trial counsel has subsequently died and is no longer available to provide any rationale for his actions. What should the courts do in respondent's view? Grant automatic relief on the ground that an apparent mistake has not been explained by the attorney who committed it? Or engage in a hypothetical inquiry about what counsel *could reasonably* have been thinking at the time? Does the Sixth Amendment standard vary depending on the lifespan of one's lawyer?

Respondent suggests no answers for questions like these. But it has been more than twenty years since *Strickland* was decided. It is clear that since that time, the courts have significantly diverged in their understanding of the proper standard for reviewing claims of ineffective assistance. The effort to paper over that divergence does not serve the proper development of the law. Certiorari should be granted.

II. There was no waiver of the deference issue; this Court's conflicting statements on the issue should be reconciled.

Respondent has little to say about the actual substance of the second question presented: whether a federal habeas court is free to apply the deference standard on a piecemeal basis, to parts of claims rather than to the state court's ruling as a whole. Respondent's argument on this issue is almost entirely "waiver." He asserts that the issue was not pressed or passed upon below, because petitioners did not raise the piecemeal deference claim as such at the district court level or on appeal to the Third Circuit.

Respondent fails to note, however, that petitioners *could not* raise the piecemeal deference objection at those stages – because the magistrate judge and district court here *did not apply* piecemeal deference. Those judges, unlike the Third Circuit, rejected deference altogether, on a wholesale basis. Relying on their subjective view of ineffectiveness analysis, the magistrate and district judge treated reasonable basis as a purely factual question requiring an evidentiary hearing at which counsel testifies to his thought processes. Since there was no such hearing in state court, the magistrate and district judge declared that there was nothing at all to which they had to defer. Pet. App. 34-35, 50-51.

The Third Circuit was more discriminating in applying the deference provision. For purposes of determining its standard of review, the court explicitly divided – and subdivided – the *Strickland* test into various components. Pet. at 22-23. Respondent does not contest this. Instead he seems to contend that the court was not sufficiently introspective about its ruling, because it did not cite authority or discuss the issue in any depth before asserting its position. But such heuristics are not required for issue preservation. The court

below plainly applied the deference standard on a piecemeal basis, and therefore plainly passed upon the issue. Petitioners properly press it in this Court.

As to the merits, respondent has only two brief points. First he asserts that there really is no issue, because a federal court cannot be expected to defer to a legal ruling "that the state court did not make." Brief in Opp. at 20. But that is exactly the question here: what *is* the state court ruling to which the federal court must defer? Is it the pronouncement that a claim is meritless, or is it the steps that lead to that result? Respondent apparently has no easy answer for that question, and neither will the lower federal courts – because this Court has taken inconsistent approaches in *Weeks v. Angelone*, 528 U.S. 225 (2003), and *Wiggins v. Smith*, 539 U.S. 510 (2003).

Second respondent asserts that the issue isn't very important, because it has arisen only in two cases in one circuit. But that is incorrect. Many courts have held that the deference standard must be applied to the state court ruling, not its reasoning. *See, e.g., Santellen v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001); *Gipson v. Jordan*, 376 F.3d 1193, 1197 (10th Cir. 2004); *Wright v. Dep't of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002).

Courts have clearly begun to notice, however, that *Wiggins* appears to contradict this principle. *See, e.g., Williams v. Anderson*, 460 F.3d 789, 796 (6th Cir. 2006) ("Where the state court fails to adjudicate a claim on the merits, however, AEDPA's deferential standard of review does not apply.... This rule extends to portions of a claim not addressed by the state courts. *Wiggins*"); *Jimenez v. Walker*, 458 F.3d 130, 143 & n.12 (2nd Cir. 2006) ("when a state court has articulated its reasons for rejecting some elements of a federal claim, AEDPA deference applies only to the elements that

the state court discussed [citing *Wiggins*].... This is not necessarily to endorse the rule of *Wiggins*.... Indeed, one might well question why the extent of the state court's explanation changes the nature of federal habeas review as constrained by [28 U.S.C.] § 2254(d)").

The issue at stake here is the threshold question in every habeas claim addressed on the merits by any federal court. It is appropriate to provide a resolution.*

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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* Respondent has raised an issue concerning the current status of his custody. The federal district court clarified in conference, however, that its order required only respondent's release from the physical custody of the state prison system. The state trial judge, after consulting with the federal district court judge as to his intent, has now ordered respondent held in local custody, pending disposition of the petition for certiorari.